

June 4, 2014

Karl Drexel, SDA
Administrator, Tomales Village
Community Services District
PO Box 303
Tomales, CA 94971

Re: Your Request for Advice
Our File No. I-14-075

Dear Mr. Drexel:

This letter responds to your request for advice regarding the conflicts-of-interest provisions under Government Code Section 1090 et seq.¹ Because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. In addition, we do not render advice based on past conduct. (Section 1097.1(c)(2).)

Based on the limited facts you provided, we are treating your request as one for informal assistance. For purposes of Section 1090, because your request does not provide specific information regarding a future government contract, we are only providing informal assistance and do not deem this letter to meet the requirements to permit the requester to offer the letter into evidence in a Commission enforcement proceeding or criminal prosecution regarding Section 1090. (See Section 1097.1(c)(5).)

Please note that after forwarding your request to the Attorney General’s Office and the Marin County District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

¹ All further statutory references are to the Government Code unless otherwise indicated.

QUESTION

Does Section 1090 prohibit you as an independent contractor providing services to the Tomales Village Community Services District (“TVCS D”), a government agency, from making or participating in making your individual contract for services, which then requires approval from the TVCS D Board of Directors?

CONCLUSION

No. Section 1090 does not prohibit you as an independent contractor providing services to the TVCS D from making or participating in making your individual contract for services so long as you are doing so in your private capacity, as explained below.

FACTS

You are an independent contractor currently acting as the Administrator and appointed Treasurer of the TVCS D. You stated that the original TVCS D Board of Directors hired you as an independent contractor in 1999 to perform the administrative duties and be the General Manager, Bookkeeper, CFO and CEO of the District. You participated substantially in writing your own contract in 1999 and in subsequent changes to the contract since that time. In essence, you created your own contracts which were then submitted to the Board for approval.² You have indicated that this continues to be the practice when the TVCS D hires independent contractors. Thus, your general inquiry is whether the Board is required to actually write or create the agreements when it contracts with independent contractors.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. 49, 50 (2006).) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

² As mentioned, the Commission does not provide advice with respect to past conduct. For purposes of this advice, however, we will assume that you will be contracting in the future with the TVCS D for your services.

We normally employ a six-step analysis to determine whether a public official has a conflict of interest under Section 1090, but here we find it necessary to provide discussion on the first three steps only.

Step One: Are you subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

According to your facts, you are an independent contractor acting as the Administrator and appointed Treasurer of the TVCSD. With respect to Section 1090, it has been held that “independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency may not have personal interests in that agency’s contracts. [Citations.]” (*Hub City Solid Waste Services v. City Of Compton*, 186 Cal.App.4th 1114, 1124-1125.)

Thus, your status as an independent contractor does not automatically immunize you against the prohibitions of Section 1090. It is necessary to look to the degree of influence you have over TVCSD’s contracting decisions in your capacity as its Administrator and appointed Treasurer. Whether you come within the reach of Section 1090’s provisions is a purely factual issue which we are unable to address further due to the lack of information on this point. However, we will assume that you do come within the reach of Section 1090 for purposes of this analysis.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

Your request deals squarely with a contract to provide your independent contractor services to the TVCSD, so this step is satisfied.

Step Three: Will you be making or participating in making a contract?

As mentioned above, Section 1090 generally prohibits those subject to its provisions, while acting in their official capacities, from making contracts in which they are financially interested.

Your facts indicate that, as an independent contractor, you essentially develop your own contract, which then needs approval of the Board. In other words, the Board does not necessarily participate in writing the actual contract, but it is responsible for approving the contract.

Generally, officials who participate in any way in the making of the contract are covered by Section 1090. Participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Thus, by virtue of the fact that you actually develop the terms of the contract for the Board to approve, you would be making or participating in the making of a contract under Section 1090. (See, e.g., 80 Ops.Cal.Atty.Gen. 41 (1997) [two firefighters, through their private company, would be “making” a contract with the city for the sale of their protective devices because they would be involved in the negotiations leading up to the execution of the contract].)

However, Section 1090 prohibits officials from making or participating in making contracts in which they are financially interested only *while acting in their official capacities*.³ The critical question, therefore, is whether you are acting in your official capacity when you participate in the development of your contract for services, which is then submitted to the Board for approval.

In 80 Ops.Cal.Atty.Gen. 41, *supra*, two city firefighters developed a firefighting protective device that they intended to sell to the city’s fire department. The opinion focused on whether the firefighters could sell the device to the city without violating Section 1090. (*Ibid.*) Important to the analysis was whether the firefighters would be making the contract “in their official capacity.” (*Id.* at p. 43.) In finding that the firefighters would be contracting with the city solely in their individual capacities, the opinion noted that “[t]hey will have no input, as employees, into the city’s decision whether to make the purchase. The decision will be made by the city council or city manager upon the recommendation of the fire chief.” (*Id.* at p. 44; see also 85 Ops.Cal.Atty.Gen. 87 (2002) [a newly elected city councilmember could continue contracting with the city to provide it with employment development services because the new contract, which would be executed by the city manager, would be made by the councilmember in his private capacity].)

Consistent with these opinions, you would be making or participating in making your individual contract for services in your private capacity so long as you have no input, in your official capacity, into the Board’s decision whether to approve the contract. The fact that the Board does not write or develop the contract does not change this conclusion so long as any action you take associated with the making of the contract is done in your private capacity.

³ This “official capacity” requirement is echoed in Section 1092 where it states that “[e]very contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member.”

In this regard, we would advise that the TVCSD's attorney provide oversight with respect to the contracting process to ensure proper boundaries are established for purposes of Section 1090.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl